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MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-706

ARBRY McCULLEY, Administrator of the Estate of Booker Clemons, Deceased,

Petitioner,

vs.

MITSUI O.S.K. LINES, LTD. and BABA-DAIKO SHOSEN, K.K.,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Since the decision of the United States Court of Appeals for the First Circuit in *Johnson* v. *A/S Ivarans Rederi*, 613 F.2d 334 (1980), the conflict in the circuits regarding the standard of care in an action under the LHWCA has become more acute. The First Circuit has sharply disagreed

with the Seventh Circuit in the case sub judice and has flatly stated that the panel of the Seventh Circuit outright misapplied one of the very decisions passed down by the First Circuit and relied upon by a panel of the Seventh Circuit in reaching the conclusion that the Seventh Circuit did. A panel of the Seventh Circuit reversed a jury's verdict on special interrogatories finding, inter alia, that the vessel's negligence was the proximate cause of the plaintiff's injuries. [Tr. pp. 688-689] The Seventh Circuit, in so doing, stated at least four times, in various ways, in its opinion that, based on the facts in *Clemons*, "we firmly conclude that the evidence is of insufficient probative value for jurors fairly and impartially to differ as to the inferences to be reasonably drawn on the question of whether in the context of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, any negligence could be attributed to these defendants." *Clemons*, 596 F.2d at 748.

The case of *Clemons* at bar is very similar to *Johnson* recently decided by the First Circuit. In both cases the jury was instructed in accordance with the basic concepts of §§343 and 343A of the Restatement of the Law, Torts II. [*Johnson*, at p. 350; *Clemons*, Tr. pp. 664-665]. However, the First Circuit was of the opinion that, to the extent the standard was not one of "reasonable care under the circumstances" which it concluded should be the appropriate standard, the instruction was erroneous; but, since the jury found liability on a standard which is more favorable to the vessel owner, the district court's error was harmless. For, if the jury found the vessel solely negligent under the standard of §§343 and 343A, it would have found the vessel solely negligent under the "reasonable care under the circumstances" standard. See, *Johnson*, at p. 350.

Since *Johnson* involved a longshoreman falling into an open unguarded hatch, the vessel owners cited *Clemons* as authority that no liability should attach. The First Circuit not only disagreed with *Clemons*, but it criticized it. *Johnson* pointed out that *Clemons* purported to rely on the First Circuit's decision in *Stanley* v. *United States*, 476 F.2d 606 (1973) that the §343A exception does not apply because there was no evidence in *Clemons* that the stevedore would employ careless workers or fail to take necessary safety precautions. [*Clemons* at p. 750]. The *Johnson* court said "[t]his is an excellent example of the pitfalls inherent in the use of §343A in §905(b) cases." In *Stanley*, Maine law was applied in reversing a jury verdict. The First Circuit noted that the "burden of establishing the exception should be substantial. Otherwise, since whenever a party has been injured the warning has in fact been ineffective, there will be a danger of the exception being found to swallow up the rule. This rule, *which we believe applies only on land*, imposes a heavy burden on the plaintiff." The court continued:

> "The plaintiff must prove that the defendant should have known the plaintiff could not competently assume the risk associated with the known danger or would be negligent in dealing with the danger. Underlying this burden is the assumption that a landowner may allow the existence of an unreasonably dangerous condition on his land and may contract with persons for them to work around those dangers without incurring any liability, on the grounds that the contractors assumed the risk of working around those known dangers. The landowner would be liable only if it failed to warn the workers of latent conditions or if it oppressed them, such as by allowing them to work when the landowners knew or should have known the workers could not possibly avoid the danger.

> While this may be a *terrene rule* of this court, the dictates of §905(b) would prohibit the creation of a second and similar rule for application upon navigable waters. By enacting §905(b), Congress sought to focus attention on the amelioration of dangerous conditions on board ship. The rule in *Stanley*, as lowered into the ship by *Clemons*, focuses on the accuracy of the longshoreman's perception that he can avoid the danger. Once the stevedore and/or the longshoreman makes that decision under *Clemons*, the issue of the vessel's lack of care in allowing the condition to exist evaporates. There would be no balancing of the usefulness of the dangerous condition and the burden involved in curing it against the risk to others of its continued existence. The effect of this rule, *contrary to the intent of Congress*, is to allow the vessel to be protected from its negligence." [*Johnson*, fn. 12]

The First Circuit then went on to illustrate the various cases in which courts have treated longshoremen falling into open unguarded hatches. After a careful analysis and a consideration of the *Johnson* opinion, it is obvious that the panel of the Seventh Circuit was clearly wrong for turning over the jury's finding for the plaintiff for many reasons:

> (1) *Stanley* v. *United States* is distinguishable on its facts. There, a boy of 20 years of age, his second day on the job, fell from a tower into an open manhole, in daylight. The court held there was no evidence the defendant should have supposed the independent contractor would have hired careless and inexperienced workers. *Johnson* has now clearly stated that it never intended its decision to apply in a maritime context.
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> (2) *Miller* v. *The Sultana*, 176 F.2d 203, *Long* v. *The Silver Line, Ltd.*, 48 F.2d 15 are also clearly distinguishable on their facts. *Miller* involved a fall into an open unguarded hatch on the upper deck of a ship in broad daylight, whereas *Clemons* conditions were

in the dark in the lower hold of the ship, where the condition was not as "open and obvious". The panel of the Seventh Circuit without making a balanced inquiry into the reasonableness of the circumstances stated: "As seen . . . *Long* v. *Silver Line; Miller* v. *The Sultana; Ove Tysko* v. *Royal Mail Steam Packet Company* specifically hold that it is not negligent for a hatch to be left open in anticipation of the commencement of cargo work. The authority of these cases has remained undiminished. In fact, plaintiff admits that general maritime law is pertinent and that cases decided on the basis of standards prior to 1972 amendments to the LHWCA are still viable precedents." [*Clemons,* p. 751]. Such rigid application of past decisions fails to take into account the direction of Congress in enacting the 1972 amendments that "there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties." [*Johnson,* p. 339].

Yet, despite this mandate from Congress, the Seventh Circuit panel completely disregarded the special verdict of the jury and held that "the behavior of the stevedore belies any possible inference that the ship's crew was negligent . . . The stevedore statutorily charged with the primary responsibility for the safety of its employees, did not ask the crew to rig a safety line at the time it requested the tanks B and C to be opened. . . ." There is nowhere to be found in "the statute" the categorical statement that the stevedore is charged with the primary responsibility for the safety of its employees.

The Seventh Circuit panel further shows its total rigidity in understanding LHWCA cases in *Clemons,* footnote 2,

when it outright states that "[if] plaintiff had proved that his accident had been caused by poor lighting on the ship, the OSHA regulations would place that responsibility on the Stevedore rather than the shipowners. 29 C.F.R. §§1918.2 and 1918.92." This rigidity is further amplified by the panel's paraphrasing that "Congress concluded that the major responsibility for the proper and safe conduct of the work to be done is to be borne by the Stevedore, from whom this plaintiff has already recovered workmen's compensation under the Act." *Clemons,* p. 748. With an approach like this, few longshoremen would have a chance of recovering in the Seventh Circuit.

As in *Clemons,* the *Johnson* court was asked to rule whether the district judge erred in denying the motions of the vessel owner for judgment n.o.v. or, in the alternative, for a new trial. [*Johnson,* p. 351; *Clemons,* p. 748]. Clemons' lawyer, in his petition for certiorari urges affirmance is necessary if the jury's answers to the special interrogatories are consistent and that the Court of Appeals would be violating the Seventh Amendment to the Constitution of the United States if, in reviewing the jury's special interrogatories, it reversed, if under any view of the case the interrogatories are, or can be made, consistent. *Atlantic & Gulf Stevedores* v. *Ellerman,* 369 U.S. 355 (1962). In *Johnson,* the court found the jury could reasonably have found that the hatch covers were left open by a crew under the control of the ship; that the hatch was left unguarded and the hatch left unlighted; that the vessel was reminded of this condition prior to the commencement of the work by the signalman and that the vessel should reasonably have expected longshoremen working in adjacent hatches to enter the No. 3 hatch and fall into the opening in the 'tween deck created by the opened hatch covers. [*Johnson,* p. 351]

On essentially the same facts, the panel of the Seventh Circuit came to the opposite conclusion and reversed the jury's verdict of negligence on the part of the vessel on five special interrogatories [Tr. pp. 688-689]. In the *Atlantic & Gulf Stevedores* case, *supra,* the Supreme Court said "neither we nor the court of appeals can redetermine facts found by the jury any more that the district court can predetermine them." [pp. 358-9]. For, in deciding the propriety, *vel non,* of the entry of a judgment n.o.v. or a directed verdict, the appellate court is constitutionally forbidden to reappraise the evidence, and, in the language of the Third Circuit, must solely decide whether, looking at the record coldly, it is so critically devoid of that minimum quantum of evidence from which a jury might reasonably afford relief. *Denneny* v. *Siegal,* 407 F.2d 433, and *Continental Ore Co., et al.* v. *Union Carbide Co., et al.,* 370 U.S. 690 (1961). Using that test, it is clear that *Clemons'* case should be heard by the Supreme Court to resolve the conflict, and reverse *Clemons,* as it is patently a bad decision and contains much misleading *obiter dictum* which has a way of persuading other courts to come to wrong conclusions, although *Clemons* has apparently not been cited by any other court in the nation, except in the order denying the Petition for Rehearing in *Santos* v. *The Scindia Navigation* Court, No. 79-512, to say that it was not being followed.

As in *Johnson,* the district court found, in *Clemons,* and it is urged in this Court, that the jury here could reasonably have found that the deep tanks in the lower hold in which plaintiff was to work were opened by a crew under the control of the vessel during the supper hour between 6:00 and 7:00 p.m. on November 23, 1976 [Tr. p. 200]; there was a custom in the maritime industry that when the crew opens the deep tanks it is customary to rig a

safety line or net around those tanks to avoid someone falling in, when the tanks are not actually being worked [Tr. pp. 175-177]; after the crew opened the tanks they put no safety line around the tanks, and that none was there when the longshoremen returned from supper to resume working in the *adjacent* deep tanks which they were working [Tr. pp. 199-201]; plaintiff fell into the deep tanks which were about 20 feet wide and 21 feet deep [Tr. pp. 113, 123]; the stevedore's foreman, Mr. Albert Johnson, informed the crew's duty officer that there was about 30-45 minutes more unloading to do in the adjacent deep tanks, *after supper,* to complete before the commencement of operations in the deep tanks opened which did not have the safety line rigged around it, and into which the plaintiff fell, clearly meaning that those tanks were *not* going to be worked immediately upon the longshoremen's return from supper at 7:00 p.m. [Tr. pp. 199-201].

On these facts, the jury found: (1) the defendant vessel owner was negligent; (2) that negligence was the proximate cause of the plaintiff's injuries and damage; (3) Clemons was contributorily negligent; (4) His negligence was 13% responsible for the occurrence; (5) His full damages were $322,000.00. The panel of the Seventh Circuit completely misunderstood the balance of the tripartite role of stevedore, vessel and longshoreman, and disregarded the fact that the stevedore can be concurrently negligent with the vessel owner, although that was never contended by the plaintiff. However, assuming, *arguendo,* that were the case the plaintiff could still recover the full amount of his damages from the vessel. *Edmonds* v. *Compagnie Generale Transatlantique,* ..... U.S. ....., 99 S.Ct. 2753 (1979). Even the *Edmonds* decision is clear that the Congressional intent in the 1972 Amendments shows nothing to change or

abrogate the rule that the previously applicable principles of negligence were to be changed or made stricter post 1972.

The panel of the Seventh Circuit has made a Draconian ruling in longshoremen's cases as evidenced in *Clemons*. It appears they have backed off a bit in their subsequent opinion of *Matthews* v. *Ernst Russ Steamship Company*, 603 F.2d 676 (7th Cir., 1979). In *Matthews*, the Seventh Circuit again refused to take a decisive position as to what the standard of care is in a §905(b) case, and sidestepped the issue by sanctioning a "reasonable care under the circumstances" standard, as approved in the recent case of *Santos* v. *Scindia Steam Navigation Company*, No. 79-512, see *Matthews*, p. 682. By observing the Seventh Circuit's comments in *Matthews* [p. 682] of its previous decision in *Clemons*, it is obvious that it disregarded the jury's special findings of fact, and reversed in conflict with the Seventh Amendment. In light of *A/S Ivarans Rederi* v. *Johnson*, Supreme Court Docket No. 79-1587, and the reported decision of the First Circuit, the conflict in decisions is more apparent than ever. Certiorari should be granted in *Clemons*.

Respectfully submitted,

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